(4)

NO. 89-1885

In the
Supreme Court of the United States

OCTOBER TERM, 1990

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE

Petitioners

VERSUS

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R. WILLIAM MCINNIS AND ALLSTATE INSURANCE COMPANY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

INTRODUCTION

The reply briefs of defendants, Sizeler, Sears and Allstate, are quite heated in their rhetoric, but, in fact, offer little to refute petitioners' main point: the procedure of combining the remand motion with a motion for summary judgment is an unconscionable rush to judgment that deprives these, and plaintiffs to follow, of fundamental procedural protections.

I.
PLAINTIFFS WERE NOT GIVEN SUFFICIENT OPPORTUNITY TO DEFEND AGAINST SUMMARY JUDGMENT

This Honorable Court would be seriously mislead by depending on defendants' chronology of events in this case. For example, the Sears/Allstate brief says:

> Defendants raised the issue of fraudulent joinder explicitly in their removal petition served on plaintiffs . . . on or about March 7, 1988, fully four months - not six weeks- before the July 13th hearing on the remand and *summary judgment* motions.
>
> Sears/Allstate Reply Brief at 9 (emphasis added)

Through a bit of brief writer's slight of hand Sears/Allstate notes only the date on which "fraudulent joinder" was raised compared to the date of the hearing on the "remand *and* summary judgment motions". Obviously what they do *not* mention is the date of the summary judgment motion. However, the motion for summary judgment was not received by petitioners until on or about May 24, 1988, allowing only 49 days to prepare to oppose a summary judgment; which would have supported petitioners' motion

to continue.

However, the District Court *did not rule* on petitioners' motion to continue and heard the summary judgment on July 13. Sears/Allstate suggest that petitioners had not supported their motion to continue with a specific affidavit by petitioners' counsel. This is clearly incorrect. Counsel's affidavit, attached as Exhibit "A", makes numerous specific references to the discovery needed to oppose summary judgment.

To add insult to injury during this rush to judgment, petitioners were served *on the morning of the hearing* with a motion to strike certain of petitioners' affidavits submitted in opposition to summary judgment. The lateness of this motion should have alone required a continuance. Nonetheless, the hearing went on. Two days later, *without giving petitioners their requested opportunity to oppose the motion to strike,* see attached Exhibit "B", the court issued a minute entry, granting summary judgment in favor of Sears and Sizeler and granting Sears' Motion to Strike. Moreover, the District Court struck all four of petitioners' affidavits when the technical objections were raised only with respect to three of them. Consequently, the core of petitioners' case was gutted by a summary judgment that they had only 49 days to prepare for, despite good reason shown for a continuance.

II.
PLAINTIFFS WERE RIGHT TO BE CAUTIOUS ABOUT THE WAIVER OF THE RIGHT TO REMAND

Respondents all admit in their reply briefs that many, if not most, grounds for remand can be waived by proceeding with the development of the removed case prior to the determination of the right to remand *vel non.*

Somehow respondents believe that just because subject matter jurisdiction cannot be waived that the Hobson's Choice poses no problem. Nothing could be further from the truth. Indeed, almost every basis for remand other than subject matter jurisdiction must be raised by motion promptly after removal. Even before the 30 day rule of the 1988 amendments to 28 U.S.C. § 1447, this rule of promptness was in effect.

Of course, such a rule makes sense in order to resolve the removal question as quickly as possible, However, it makes little sense if a motion to remand puts the case on a fast track to summary judgment. This is true for two reasons. First, it is basically unfair to require a plaintiff who chooses a state court forum in effect to prepare and litigate the substance of his claim when jurisdiction has not yet been established. Second, it allows the removing party to manipulate the federal judicial system by using that system as the forum for development of the case, if not for ultimate resolution.

Perhaps it is the realization by our federal courts of these significant problems which has placed respondents in the position of arguing that the remand/summary judgment procedure used in this case was routine, while at the same time leaving them unable to cite a *single* case that holds such a procedure is approved. Neither reply brief cites any case holding that it is proper, appropriate or within the federal rules to combine a remand motion and a motion for summary judgment.

A futile attempt at such authority is contained in the Sears/Allstate brief at page 16 where it is said that in the *Keating* case "the Fifth Circuit directed that the course-and-scope issue be determined '[b]y summary judgment or otherwise' 'but short of 'a full dress trial on the merits.' Hardly an endorsement for the propriety of the new

procedure.

What respondent does not say is that the procedure actually used by the district court, and approved by the Fifth Circuit in *Keating*, was the one urged by petitioners herein. That is, the district court agreed that the non-diverse defendants were fraudulently joined and therefore remand was refused. However, the non-diverse defendants were *dismissed for failure to state a claim against them upon which relief could be granted.* In other words, the *Keating* court did *not* force plaintiffs into a premature summary judgment but rather granted a motion to dismiss under Federal Rule 12 (b) (6). Consequently, *Keating*, even with its dictum, is no authority for respondents' position.

This point is extremely important for purposes of this Honorable Court in deciding the general significance of this writ. There is no authority for the procedure used, yet respondents would have this Court believe that the trial court "squeeze play" was simply a matter of routine not befitting this high court's attention. If the instant opinion stands it lurks as a tool to surprise other litigants who have rightly depended upon the total absence of any precedent supporting this procedure. This Court should simply decide, and thereby warn all litigants faced with removal, that they either will or will not have to prepare for summary judgment before the fundamental jurisdictional question is decided.

III.
A DISTRICT COURT HAS NO JURISDICTION TO GRANT A SUMMARY JUDGMENT UNTIL THE REMAND DECISION IS INDEPENDENTLY DECIDED

Respondents seem not to understand the critical jurisdictional importance of keeping separate the remand decision from any substantive decision on the merits. The Sizeler brief, for example, characterizes petitioners' posi-

tion with some ridicule and disbelief:

> One must ask: Do petitioners suggest that the [sic] a different result should obtain if the remand motion were heard at 9:00 a.m. and the summary judgment motions at 10:00 a.m.?
>
> Brief of respondent
> Sizeler at 11.

Respondent completely misses the point! It is not simply the timing of the motion that is important, but rather determining the power to act. If a summary judgment is considered contemporaneous with a motion to remand it is impossible for a court to keep separate a consideration of the merits from a consideration of its very jurisdictional power to act. Plaintiffs are entitled to be shown the basis of the court's jurisdiction before it ends the case on it merits. Consequently, in addition to the timing, the very procedure itself must be questioned. Does a remand combined with a summary judgment "bootstrap" the court's jurisdiction?

Clearly, such a procedure *does* bootstrap jurisdiction. The court decides the merits of the case *because* it "has jurisdiction", it has jurisdiction *because* of its preliminary assessment of the merits. Plaintiffs are faced with a clear "catch 22".

Professor Wright has explained the significance of the difference between the use of Federal Rule 12(b) and summary judgments.

Given the difference, Professor Wright notes how uniquely inappropriate it is to use summary judgments to deal with jurisdictional questions:

> In general, courts have ruled that summary judgment is an inappropriate vehicle for raising a

> question concerning the courts subject matter jurisdiction, personal jurisdiction or venue, or a defect in the parties. . . .
> . . . If a court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action. In addition, a dismissal for want of jurisdiction has no res judicata effect and the same action subsequently may be brought in a court of competent jurisdiction. A summary judgment, on the other hand, is on the merits and purports to have a res judicata effect on any later action. The court's role on the two motions is also different. On a motion attacking the court's jurisdiction, the district judge may resolve disputed jurisdictional fact issues. On a motion under Rule 56 he simply determines whether any issues of material fact exist that require trial.
>
> Wright, Miller & Kane,
> *Federal Practice & Procedure: Civil 2d* § 2713.

The Seventh Circuit has recognized this principle in the context of competing motions to remand and a motion to dismiss for lack of personal jurisdiction, *Allen v. Ferguson*, 791 F.2d 611, 615, 616 (7th Cir. 1986).

Allen, supra, puts the Seventh Circuit at odds with the Fifth Circuit at least with respect to the preeminence of the remand/jurisdiction question. *See also, Walker v. Savell*, 535 F.2d 536 (5th Cir. 1964). To allow the current Fifth Circuit view to prevail is to invite the exercise of federal jurisdiction where it might not exist, under circumstances where it will be impossible to challenge. Federalism and fairness fall prey to speed.

IV.

THE FIFTH CIRCUIT APPROACH WOULD ALLOW MANIPULATION OF THE FEDERAL COURTS BY ENTERPRISING DEFENDANTS

The purpose of the summary judgment procedure is clearly to decide the case *on the merits*. Consequently, when properly administered, the motion for summary judgment should only be allowed after sufficient factual development has been allowed. While it is true that petitioner herein has suffered from a lack of sufficient time to conduct discovery prior to summary judgment, this Court must also evaluate the general impact of the new Fifth Circuit procedure allowed by this case.

That is, if summary judgments can be combined with remand motions, will defendants be able to avail themselves of federal jurisdiction, even where it does not exist, at least to the point of trial.

Federal Rules of Civil Procedure Rule 56 clearly encourages extensive discovery and factual development prior to ruling on a motion for summary judgment. *See* F.R.C.P. Rule 56(c)(e). Also, subsection (f) of the Rule provides for continuances to facilitate factual development through discovery prior to a summary judgment. *See* F.R.C.P. Rule 53(F).

Consequently, extensive discovery may be needed before a summary judgment can be made consistent with the Rule. Some courts have gone so far as to say that discovery sufficient to litigate might be necessary before a summary judgment can be entertained. *See, e.g., Erie Technology Products, Inc. v. Centri Engineering, Inc.*, 52 F.R.D. 524 (M. D. Penn. 1971).

Given this concern with proper factual development prior to summary judgment the Fifth Circuit remand/summary judgment procedure threatens to embroil federal courts in extensive pretrial proceedings before jurisdicition is ever determine. Indeed, the federal courts, both trial and appellate, will be involved in full pretrial preparation of the

case, in order to follow diligently Rule 56, only to decide finally that the motion to remand should be granted, thereby returning a state court case, stamped with the imprint of the federal court, to the state court for trial.

An enterprising lawyer who believes that the federal system will benefit his case, at least pre-trial, will seek sanctuary in the fraudulent joinder hovel. And he need not be acting in bad faith in order to maximize this tactical advantage, it is handed to him by the combined remand/summary judgment rule.

If, in fact, remand would be decided first there would be no need for the extensive factual development required for summary judgment. Remand could be achieved without the excessive involvement of the federal courts.

If, however, the Fifth Circuit rule is followed, any plausible suggestion of fraudulent joinder lays open the entire panoply of pre-trial entanglement before remand is ever reached.

Hence the Fifth Circuit rule either hastens the summary judgment decision to achieve resolution of the remand issue, thereby forcing the opponent of removal prematurely and unfairly to defend the merits. Or, it prolongs the remand decision in true service of Rule 56, thereby imposing federal court management on a case that might be returned to state court.

In either event, either removal/remand policy or summary judgment policy is thoroughly undermined for no good end. Simply putting the horse before the cart would solve the problem. Thus, petitioners urge this Court to correct this error in the Fifth Circuit procedure.

V.
THE COURT BELOW INCORRECTLY APPLIED LOUISIANA LAW

Without repeating petitioners' original brief, it is important to make this Court aware of a recent Louisiana Supreme Court case that clearly shows that petitioners would never have suffered a summary judgment in this case in a Louisiana court. *Lyons v. Airdyne Lafayette, Inc.*, 558 So. 2d 277 *rev'd* 563 So. 2d 260 (LA. 1990) involved the same issue that was so critical in the summary judgment in this case, that is, the intentional act exception to the Louisiana Worker's Compensation Statute. In *Lyons* the plaintiff alleged that he was injured on the job when his co-employee unleashed a stream of compressed air from a compressor unit. Plaintiff, of course, alleged that it was intentional, while defendants contended it was negligent at best.

The Louisiana Supreme Court reversed a summary judgment for defendant in a *per curiam* opinion, which is reproduced here in its *entirety*:

> There is a genuine issue of material fact whether plaintiff's co-employee intentionally shot the stream of compressed air at plaintiff and injured him or whether the co-employee accidentally released the stream while repairing the compressor. There is circumstantial evidence from which one could reasonably infer that the act was intentional, and weighing of factual evidence is inappropriate on a motion for summary judgment. The case of *Caudle v. Betts*, 512 So. 2d 889 (La. 1987), while presenting similar issues, was decided after trial on the merits. 536 So.2d. at 260.

Accord: Cupp v. Federated Rural Electric Ins. Co., 459 So.2d 1337 (La. App. 3d Cir. 1984); *Fontenot v. Aetna Ins. Co.*, 225 So. 2d 648 (La. App. 3rd Cir. 1969).

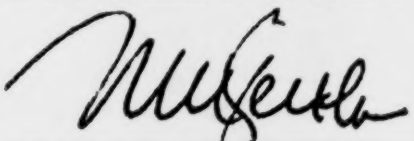
The highest state court in a single paragraph brushes away the essence of respondent's victory below. Such dramatic differences between state and federal courts are not suppose to exist on questions of state law. Consequently, the Fifth Circuit remand/summary judgment procedure combined with the erroneous application of state law puts an unacceptable premium on a defendant's access to a federal forum. It should not be allowed.

CONCLUSION

Respondents' reply brief simply does not overcome the substantial arguments about fairness and federalism that petitioners have urged upon this Court. If the Fifth Circuit approach is allowed to stand, the litigation burden on federal courts will be greatly increased and the potential for unfairness will lurk in virtually every removal case.

Respectfully submitted,

GERTLER, GERTLER & VINCENT



BY: _____

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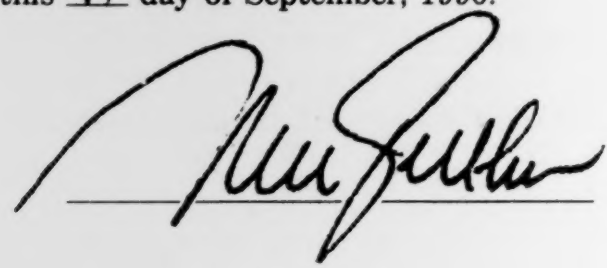
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to all opposing counsel of record by U.S. Mail, postage prepaid this 17th day of September, 1990.



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-0974
SEARS, ROEBUCK AND CO., ET AL	*	SECTION "M"
	*	MAG. NO. 6

* * * * * * * * * * * * *

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, personally came and appeared M. H. GERTLER, who, after being first duly sworn, did depose and state that:

I.

I am an attorney in the law firm of Gertler, Gertler & Vincent, attorneys for Thais Carriere, Samuel Carriere, V, Richard Darcey Carriere, Leanora Paige Carriere Tomeny, Thais Marie Carriere and Clayton Joseph Carriere, plaintiffs in the above captioned matter. I submit this affidavit in support of plaintiffs' motion to continue the hearing on defendants' motion for summary judgment.

II.

In order to adequately prepare to oppose the defendants' motion for summary judgment, it is necessary that

plaintiffs obtain a listing of the reported criminal incidents at the Lake Forest Plaza Shopping Center for a period of time prior to the relevant incident. Additionally, plaintiffs will seek to compel defendant, Sears, Roebuck and Company, to answer interrogatories and requests for production propounded upon defendants on or about February 26, 1988, as the answers proffered by defendants on April 13 were incomplete.

III.

The sole reason that plaintiffs suspended efforts to conduct discovery was due to the procedural posture of the case, namely that the court has yet to establish that it can in fact properly exercise jurisdiction over this case; once this issue is decided, plaintiffs will promptly proceed with all facets of this case.

IV.

Many of the allegations made against defendants consist of subjective mental impressions known only to defendants, i.e., knowledge about the dangerous condition of the loading dock and parking areas in question, intent of defendants Sears, Roebuck and Company and McInnis, as well as information concerning the security policy and procedures of defendants companies, i.e., Sears, Roebuck and Company, Sizeler Realty Company, and Sizeler Real Estate Management Company, which will require depositions of the corporate defendants through their representative, depositions of their executive officers as well as the individual defendant.

V.

The aforementioned discovery material is reasonably

likely to demonstrate the existence of a genuine dispute of material facts with respect to plaintiffs' allegations of intentional torts against Sears, Roebuck and Company and William McInnis and the allegations of negligence against Sizeler Realty Company and Sizeler Real Estate Management Company.

/s/ M. H. Gertler
M. H. GERTLER

SWORN TO AND SUBSCRIBED

BEFORE ME THIS 7th DAY

OF JULY, 1988.

/s/ Rodney Vincent
NOTARY PUBLIC

APPENDIX B

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NOTARY IN OFFICE

July 13, 1988

The Honorable Peter H. Beer
Judge, United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

RE: THAIS CARRIERE, ET AL VS.
SEARS, ROEBUCK AND COMPANY, ET AL

Dear Judge Beer:

As per my request at oral argument, I would appreciate the opportunity to respond to defendant's Motion to Strike Affidavits if you are going to consider that motion in the context of the Motion to Remand and especially, since the question of my good faith has been put at issue.

As I indicated, I was only served with the Motion to Strike on the morning of the hearing.

Thank you for your consideration.

With kindest regards,

/s/ M.H. Gertler

M. H. GERTLER

MHG:cfl

cc: All counsel of record